No. 89-7662

In The

Supreme Court of the United States

October Term, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN
MECKLENBURG CORRECTIONAL CENTER OF THE
COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 29, 1990
CERTIORARI GRANTED OCTOBER 29, 1990

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RELEVANT DOCKET ENTRIES

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4/26/88	Petition for A Writ of Habeas Corpus.
5/17/88	Respondent's Motion to Dismiss Petition (and Memorandum in Support).
7/15/88	Petitioner's Memorandum in Opposition to Motion to Dismiss and Motion For An Evidentiary Hearing (and Memorandum in Support).
7/25/88	Respondent's Reply to Memorandum in Support of Motion To Dismiss; Memorandum in Opposition to Motion for An Evidentiary Hearing.
8/11/88	Petitioner's Reply Memorandum In Support of Motion For An Evidentiary Hearing; Surreply in Opposition to Motion to Dismiss.
8/15/88	Respondent's Rebuttal In Support of Motion to Dismiss.
12/6/88	Memorandum Opinion.
1/3/89	Notice of Appeal.
1/4/89	Certificate of Probable Cause to Appeal.

United States Court of Appeals for the Fourth Circuit (89-4002)

1/10/89	Death penalty case docketed.
1/12/89	Record on appeal filed.
1/17/89	Docketing statement filed by Appellant Roger K. Coleman.
3/27/89	Brief and Joint appendix filed by Appellant.

4/21/89	Brief filed by Appellee.
5/8/89	Reply brief filed by Appellant.
10/2/89	Oral argument heard.
1/31/90	Published opinion filed.
1/31/90	Judgment order filed.
2/14/90	Petition filed by Appellant Roger K. Coleman for rehearing.
2/27/90	Motion for rehearing, suggestion for rehearing en banc denied.
3/23/90	Mandate issued.

COMMONWEALTH of VIRGINIA

TWENTY-NINTH JUDICIAL CIRCUIT

June 23, 1986

Jacqueline G. Epps
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101 North Eighth Street
Richmond, Virginia 23219

David E. Green, Esquire
Arnold & Porter, P.C.
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

John M. Farmer, Esquire
Wolfe & Farmer, P.C.
P.O. Box 625
Norton, Virginia 24273

Re: Roger Keith Coleman v. Gary L. Bass, Warden
Mecklenburg Correctional Center

Dear Ms. Epps, Mr. Green and Mr. Farmer:

This is a Petition for a Writ of Habeas Corpus filed by the Petitioner in the Circuit Court of Buchanan County to a conviction for capital murder for which the Petitioner was sentenced to death and after the Supreme Court of Virginia affirmed said conviction and upheld the death penalty. This Court heard evidence on said Petition for two full days on November 12th and 13th, 1985. Counsel for the Petitioner filed a memorandum in support thereof on March 11, 1986, the Respondent filed a post hearing memorandum in support of the motion to dismiss on May 19, 1986, the Petitioner filed a reply memorandum on June 18, 1986.

The Court is being asked to make findings of facts and conclusions of law on the following issues:

I. WAS THE PETITIONER CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY?

A) Do the facts show that George Marrs was a biased juror and if so does that bias entitle Roger Keith Coleman to a new trial?

II. WAS THE PETITIONER DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

A) Did defense counsel conduct a proper investigation and properly prepare the case?

B) Did defense counsel make an adequate investigation and preparation for the change of venue hearing?

C) Did defense counsel make an adequate investigation and preparation for the alibi defense and the preparation for sentencing?

D) Was the performance of defense counsel deficient and if so did it prejudice the defendant?

III. DID THE PROSECUTION MAKE IMPROPER REMARKS IN THE CLOSING ARGUMENT AND IF SO DID IT PREJUDICE THE PETITIONER?

IV. DID THE EXCLUSION OF DEATH PENALTY OPPONENTS FROM THE JURY VIOLATE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

V. WHERE PETITIONER'S DUE PROCESS RIGHTS VIOLATED UNDER *MIRANDA v. ARIZONA*?

VI. WERE IMPROPER INSTRUCTIONS GIVEN AND IF SO DID THE GIVING OF SAID INSTRUCTIONS PREJUDICE PETITIONER?

VII. ARE VIRGINIA'S CAPITAL MURDER STATUTES AND SENTENCING PROCEDURES UNCONSTITUTIONAL?

I. WAS THE PETITIONER CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY?

A) Do the facts show that George Marrs was a biased juror and if so does that bias entitle Roger Keith Coleman to a new trial?

As to this issue the court must look at the evidence of Opal and Texas Rash and the evidence of George Marrs introduced at the November 12th and 13th hearing on the Petition for Writ of Habeas Corpus. The gist of the testimony of Opal and Texas Rash was to the effect that the juror George Marrs wanted to be a member of the jury trying the Petitioner and that he felt the Petitioner was guilty, these alleged statements having been made before the trial. The George Marrs testimony before this Court clearly denied any discussion with the Rashes or anyone else to the effect that he thought Coleman was guilty. Therefore, the real question here is one of credibility. It should also be noted that the juror on voir dire stated that he had not formed any opinion as to the guilt or innocence of Mr. Coleman. (Trial Transcript, Page 182)

Even if the juror had discussed the case before trial he stated under oath on voir dire that he had not formed an opinion as to the innocence or guilt of Coleman. This

Court therefore finds that the testimony of George Marrs was not biased and was creditable and that he was a fair and impartial juror who decided the issues solely on the evidence introduced at the trial.

II. WAS THE PETITIONER DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

A) Did defense counsel conduct a proper investigation and properly prepare the case?

The standard for determining the issue of ineffective assistance of counsel to be applied in this case will be as set out in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984) and in *Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983). In this connection the Petitioner in order to prevail must first show that counsel's performance was deficient which in effect is a showing that counsel made errors so serious that he was not functioning as counsel guaranteed the Defendant by the Sixth Amendment. Secondly, the Petitioner must show that the deficient performance prejudiced the defense. Thus, there must be a showing that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. In *Stokes, supra*, the Supreme Court of Virginia held that to be effective an attorney must exercise the "care and skill which a reasonably competent attorney would exercise for similar services under the circumstances." 226 Va. at 117.

Applying these guidelines this Court is of the opinion that it is not necessary to personally interview each and every witness before testifying in the trial. Usually,

as in this case there are numerous investigating officers reports, various photographs, results of scientific tests and other evidence most of which can be reviewed by counsel from the Commonwealth's file. Therefore, it is not necessary for counsel to talk to every witness if the same information can be elicited from the key investigating officers and the documented file.

B) Did defense counsel make an adequate investigation and preparation for the change of venue hearing?

Counsel for Petitioner sent a draft affidavit to Mrs. Coleman and asked her to collect signatures. This Court cannot presume that signatures or affidavits could have been obtained before the hearing on the change of venue motion. The fact some affidavits were obtained after the death sentence had been imposed does not necessarily show they could have been obtained before the venue hearing. It is significant that 49 affidavits were obtained by the Commonwealth saying the Defendant could obtain a fair trial in Buchanan County.

"The law presumes that a Defendant can receive a fair trial from the citizens of the County or City in which the offense was committed. To overcome that presumption, the Defendant must clearly show that there is such a widespread feeling of prejudice on the part of the citizens that will be reasonably certain to prevent a fair and impartial trial." *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979). Even a majority of the sex witnesses testifying at the habeas hearing on November 12th and 13th felt they could have given the Defendant a fair trial.

More importantly the Petitioner failed to carry the burden of showing prejudice as defined in *Strickland, supra.*

The Court finds that defense counsel did make an adequate investigation and preparation for the change of venue hearing although counsel should have made a greater effort to obtain additional affidavits but this Court could not say the Defendant was prejudiced by such failure.

C) Did defense counsel make an adequate investigation and preparation for the alibi defense and the preparation for sentencing?

Without reciting the evidence on the alibi defense in its totality but in summary the evidence adduced at the trial of Defendant indicates to this Court that the cross-examination of the witnesses by counsel for Defendant clearly shows they had an excellent understanding and knowledge of the facts of the case. Therefore, the Court finds that defense counsel made an adequate investigation and preparation for the alibi defense.

As to the preparation for sentencing it should be noted that the Defendant took the position that he didn't desire to present evidence as to mitigating circumstances. This could indicate one or more reasons. First, maybe he didn't have any cogent mitigating evidence to present and secondly, maybe he was fearful of prior convictions and other damaging evidence being presented by the Commonwealth. The Court finds that counsel for Defendant at the trial had made adequate preparation for the

sentencing phase and that the Defendant was not prejudiced.

D) Was the performance of defense counsel deficient and if so did it prejudice the defendant?

On the issue of ineffective assistance of counsel the Court finds that counsel exercised the care and skill which a reasonably competent attorney would exercise under similiar [sic] circumstances in investigating and preparing for trial and the Petitioner has failed to establish prejudice resulting from any deficiency.

Considering all of the evidence introduced at the trial, the habeas corpus hearing and the hearing for change of venue the Court finds that the performance of counsel for Petitioner was not deficient and did not prejudice the case.

III. DID THE PROSECUTION MAKE IMPROPER REMARKS IN THE CLOSING ARGUMENT AND IF SO DID IT PREJUDICE THE PETITIONER?

The Court adopts the findings of fact and conclusions of law as set out in Respondents brief beginning on page 32 with reference to the following:

1. The prosecuting attorneys did not distort the testimony of Elmer Gist regarding the probability that the pubic hairs found on the victim's body were those of the Petitioner. Counsel's comment that it was "extremely unlikely" that the hairs could have come from anyone

else (App. 757-58, 783) was fair inference from the testimony of Elmer Gist.

2. The prosecutor's statement that Elmer Gist testified that he found type "O" blood on the left leg of the pants that the Defendant was wearing on the night of the murder was an insignificant misstatement fact which did not constitute misconduct prejudicial to the Petitioner.

3. The prosecutor's statement suggesting that the Petitioner may have read more than one book or article on the length of time blood will stay on a knife was a fair interpretation of the evidence which did not constitute prejudicial misconduct.

4. The prosecutor's comments suggesting the reason why the Petitioner went to the residence of Sandra Stillner constitutes fair inferences that could be drawn from the evidence. These comments were not based on speculation, but based on the evidence adduced at trial.

5. The prosecutor's characterization of the Petitioner as vile was fully supported by the evidence and fair comment thereon. In fact, vileness is an element required to be proved before the death penalty can be imposed. The prosecutor's characterization of the Petitioner as cold, calculating, inhumane and animalistic was supported by the evidence and fair comment thereon. The prosecutor's remarks did not constitute prejudicial misconduct.

6. The prosecution did not imply that the jury would not be responsible for sentencing the Petitioner to death by stating that the Petitioner by his past actions and by his actions in the brutal slaying and rape of the

victim signed his own death warrant. This comment did not constitute a suggestion to the jury that some other entity had the ultimate responsibility for making the decision of whether or not the death sentence should be imposed. This case is distinguishable from *Caldwell v. Mississippi*, 105 S. Ct. 2633, 37 Cr L 3089 (6/11/85) where the jury was led to believe that the responsibility for imposing the death penalty rest elsewhere, with the Judge who imposes the punishment. Also, this case is distinguishable from *Frey v. Commonwealth* (June, 1986), where the Supreme Court of Virginia set aside the sentence in a capital case based on similar facts and circumstances set out in *Caldwell, supra.*

7. The VanDyke time card did not constitute exculpatory or critical evidence. The failure to provide it did not result in prejudice to the Defendant.

8. The exclusion of death penalty opponents from the jury did not violate Petitioner's right to a fair and impartial jury. This issue was clearly settled in *Lockhart v. McCree*, 39 Cr L 102 (May 5, 1986) by the Supreme Court of the United States as shown by the following language:

> "Prosecutor may remove for cause at the start of a bifurcated capital trial prospective jurors so opposed to capital punishment therefore answering a question raised by *Witherspoon v. Illinois*, 391 U.S. 510 (1968)."

9. The court did not err in presenting to the jury an aggravating circumstance instruction in verdict form phrased in the alternative. The law does not require that the jury unanimously agree on one or the other aggravating circumstance in order to impose the death penalty.

The jury need only be convinced beyond a reasonable doubt that at least one of the two components exist.

10. The jury was not required to find torture and physical abuse in order to conclude that an aggravated battery had been committed.

11. The omission of the requirement of torture from the "agggravated battery" instruction given to the jury did not violate *Godfrey v. Georgia*.

12. To impose the death penalty, the jury need not be convinced beyond a reasonably doubt that aggravating factors outweigh mitigating factors.

13. The instructions given by the Court were adequate to inform the jury that their decision to impose the death penalty must be unanimous and that a life sentence must be imposed if a single juror was not convinced beyond a reasonable doubt that the death penalty was an inappropriate sentence.

14. The instructions given by the Court were adequate to inform the jury that they need not impose a death penalty notwithstanding the finding of an "aggravating circumstance" beyond a reasonable doubt.

15. The Court's instructions were adequate to inform the jury that there were no limitations on what they could consider mitigation and that anything could be considered in mitigation of the death penalty.

16. Virginia's capital murder statute in sentencing procedures are constitutional.

IV. DID THE EXCLUSION OF DEATH PENALTY OPPONENTS FROM THE JURY VIOLATE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

These are covered in the above findings of fact and conclusions of law.

V. WERE PETITIONER'S DUE PROCESS RIGHTS VIOLATED UNDER *MIRANDA V. ARIZONA*?

As to the Miranda rights not having been given the Defendant at the time of interrogation by Investigator Davidson the evidence shows it had not reached the "custodial interrogation" stage. Recent decisions of the United States Supreme Court have eroded the clout of the Miranda Rights as originally set out in *Miranda v. Arizona,* much like the demise of the Fourth Amendment as it pertains to search and seizure.

VI. WERE IMPROPER INSTRUCTIONS GIVEN AND IF SO DID THE GIVING OF SAID INSTRUCTIONS PREJUDICE PETITIONER?

VII. ARE VIRGINIA'S CAPITAL MURDER STATUTES AND SENTENCING PROCEDURES UNCONSTITUTIONAL?

These are covered in the above findings of fact and conclusions of law.

CONCLUSION

In conclusion this Court is of the opinion that counsel for the Petitioner at all stages of the trial acted in such a manner as afforded said Petitioner effective assistance of counsel and that counsel functioned as counsel guaranteed a Defendant in a criminal trial by the Sixth Amendment and in accordance with the standards and guidelines set out in *Strickland, supra* and in *Stokes, supra.* At stated by this Court in the Habeas Corpus proceeding of *Everette O. Shrader, Petitioner vs. Warden of Bland Correctional Center, Respondent* (July 22, 1985) in which the Petitioner was denied a Writ of Habeas Corpus as to two life sentences for two murders – "Every Defendant is entitled to a fair trial but not necessarily a perfect trial." In *Marzullo v. Maryland*, 561 F2d 540 (4th Circuit 1977) that Court likewise held that a Defendant is entitled to effective assistance of counsel, not necessarily errorless assistance of counsel. In *United States v. Kronick* decided in May, 1986, the Supreme Court of the United States denied a claim of a Petition as to ineffective assistance of counsel even though the appointed counsel was primarily a real estate attorney without any previous criminal trial practice and had been given by the Court only 26 hours in which to prepare the defense. The Supreme Court in the opinion pointed out that the few defenses the defendant had to the charges didn't take long to prepare. The Kronick opinion clearly indicates that a Petitioner must show that his counsel was highly dificient [sic], clearly indicating that counsel made such serious errors and was not functioning as counsel guaranteed the Defendant by the Sixth Amendment. The Court further finds that any allegations in the Petition and the amended Petition not

specifically addressed in this opinion do not constitute grounds for awarding a Writ of Habeas Corpus.

Ms. Epps is directed to prepare an appropriate Order denying the Writ of Habeas Corpus, said Order to be endorsed by Mr. Green and Mr. Farmer and forwarded to the Court for entry.

Very truly yours,

/s/ Glyn R Phillips
Glyn R. Phillips, Judge Designate
P.O. Box 598
Clintwood, Virginia 24228

GRP/jys

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

ROGER KEITH COLEMAN,

Petitioner,

v.

Case No. 119-84

GARY L. BASS, WARDEN, MECKLENBURG CORRECTIONAL CENTER,

Respondent.

FINAL ORDER

This proceeding came to be heard on November 12 and 13, 1985, upon the petition of Roger Keith Coleman for a writ of habeas corpus, the petitioner appearing in person and by David E. Green, Esquire, L. Stevenson Parker, Esquire, and John H. Farmer, Esquire, attorneys representing the petitioner, pro bono, and the respondent appearing by Jacqueline G. Epps, Senior Assistant Attorney General and Kathrine M. Toone, Assistant Attorney General.

Whereupon, after having heard the evidence of the parties and the argument of counsel, the Court is of the opinion that the petition should be denied and dismissed for the reasons set forth in its letter opinion of June 23, 1986, and in the following additional findings of fact and conclusions of law:

Findings of Fact

1. Trial counsel reviewed numerous investigative reports, photographs, results of scientific tests and other

evidence contained in the Commonwealth's file. They also discussed the case with key investigating officers. It was therefore, not necessary for counsel to talk to every witness.

2. Trial counsels' investigation and preparation of the case was adequate although counsel failed to contact or interview all of the prosecution's witnesses.

3. Trial counsel adequately investigated the alibi defense by interviewing the petitioner's wife and grandmother, by interviewing other individuals who could testify as to petitioner's whereabouts on the night of the crime, by reviewing the Commonwealth's Attorney's file, and by talking with key investigating witnesses.

4. The petitioner failed to provide the names of character witnesses although requested to do so by counsel.

5. Trial counsel were aware of the distances the petitioner allegedly traveled between locations on the night of the crime and the approximate time it took to go from one place to another.

6. The Van Dyke time card did not constitute exculpatory or critical evidence and it would have been cummulative of the testimony of Philip Van Dyke.

7. Measuring the depth of Slate Creek would have served no purpose because there was no reason to believe that Slate Creek would have been the same depth at the time counsel was appointed as it was on the night of the crime.

8. Counsel conducted adequate research on hair and blood analysis.

9. Counsel conducted an adequate cross-examination of Elmer Gist and inquired into the basis for Mr. Gist's conclusions.

10. The prosecutor's remarks referring to the petitioner as vile, inhuman, animalistic and a calculating killer were not improper, and they did not render the trial fundamentally unfair.

11. The testimony of witnesses presented by the petitioner during the habeas hearing undenibly [sic] established that there was no widespread prejudice in the community that would have prevented the petitioner from receiving a fair trial.

12. The "mitigating" evidence presented by the petitioner during the habeas hearing was insignificant and grossly inadequate to overcome the aggravating circumstances.

Conclusions of law

1. Counsel's performance was within the range of competence demanded of attorneys in criminal cases and they exercised the care and skill which reasonably competent attorneys would exercise under similar circumstances in investigating and preparing petitioner's case for trial.

2. Petitioner has failed to sustain his burden of establishing that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different.

The Court is also of the opinion that the claims raised in the following paragraphs of the petition should be

alternatively dismissed on the ground that they are procedurally barred under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied, sub nom., Parrigan v. Paderick*, 419 U.S. 1108 (1975): Para. 71, Para. 76, Para. 77, Para 78-84 Para 87-102, Para. 104-109, Para. 113-120, and Para. XII.

The Court is further of the opinion that claims raised in the following paragraphs of the petition should be alternatively dismissed under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970): Para. 65-75, Para. 110, Para. 111, Para. 112, Para. 126-27. It is, therefore,

ADJUDGED and ORDERED that the transcript of the proceedings resulting in petitioner's conviction be made a part of the record herein and that the petition for a writ of habeas corpus be denied and dismissed, to which action of the Court petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this Order to the petitioner, petitioner's counsel, David E. Green, Esquire and John M. Farmer, Esquire, and Jacqueline G. Epps, Senior Assistant Attorney General.

Entered this 4th day of September, 1986.

/s/ (illegible)
Judge

I ask for this:

/s/ J. G. Epps
Counsel for the respondent

Seen and objected to:

/s/ J S Parker
Counsel for the petitioner

VIRGINIA: IN THE CIRCUIT COURT OF BUCHANAN COUNTY

ROGER KEITH COLEMAN, Petitioner,

Case No. 119-84

v.

GARY L. BASS, WARDEN, Respondent.

ORDER

Upon consideration of the petitioner's motion to correct the date of entry of judgment, the petitioner's memorandum in support of that motion, and the respondent's response in opposition, the Court is of the opinion that the motion should be denied because final judgment in this case was entered on September 4, 1986 and because the records of this Court correctly reflect that fact at the present time.

It is therefore ADJUDGED and ORDERED that the petitioner's motion be and is hereby denied.

The Clerk of this Court shall forward a certified copy of this Order to the petitioner, counsel for petitioner, and counsel for respondent.

ENTERED this 10th day of November, 1986.

/s/ illegible
Judge

I ask for this:

/s/ Donald (illegible)
Counsel for respondent

Seen and objected to:

/s/ illegible
Counsel for petitioner

STATE OF VIRGINIA,

COUNTY OF BUCHANAN, to-wit:

I, Russell V. Presley, Clerk of the Circuit Court for the County of Buchanan, in the State of Virginia, do hereby certify that the foregoing writing is a true and correct copy of an Order entered in the case of ROGER KEITH COLEMAN VS. GARY L. BASS, WARDEN, bearing date the 10th day of November, 1986, as the same appears of record in my said Office in Civil Common Law Order Book No. 13, page ___.

Given under my hand and Official seal of my said Court, this 4th day of December, 1986.

TESTE: /s/ Russel V. Presley, CLERK
CIRCUIT COURT BUCHANAN COUNTY VIRGINIA

VIRGINIA:

IN THE SUPREME COURT

ROGER KEITH COLEMAN,

Petitioner,

v. Record No. 861147

GARY L. BASS, WARDEN,

Respondent.

MOTION TO DISMISS

Now comes the respondent, by counsel, and moves this Court to dismiss the above-styled appeal. In support of said motion, the respondent says as follows:

1. This case is an appeal of a denial of a petition for a writ of habeas corpus by the Circuit Court of Buchanan County. The petitioner, Roger Keith Coleman, has been convicted of capital murder and sentenced to death. *See Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983).

2. The petition for a writ of habeas corpus was denied by the court below in an order dated and entered September 4, 1986 (See Exhibit I, copy of dismissal order).

3. Coleman filed his notice of appeal in the court below on October 7, 1986. (See Exhibit II, copy of notice of appeal). Thus, the notice of appeal was filed thirty-three (33) days after entry of final judgment.

4. Rule 5:9(a), Rules of the Supreme Court, provides that no appeal shall be allowed unless a notice of appeal is filed with the clerk of the trial court within thirty (30) days after entry of final judgment. The requirements of

that Rule are mandatory. *See Vaughn v. Vaughn*, 215 Va. 328, 210, S.E.2d 140 (1974); *Mears v. Mears*, 206 Va. 444, 143 S.E.2d 889 (1965). The thirty-day time limit cannot be extended. Rule 5:5(a), Rules of the Supreme Court.

5. In his petition for appeal filed December 4, 1986, Coleman states that the judgment of the court below was entered on September 9, 1986 and that his notice of appeal "was timely." (Pet. App. 2). These assertions are rebutted not only by the face of the lower court's order which reflects that it was entered on September 4, 1986, but also by the express rulings of the court below. When Coleman realized that his notice of appeal was untimely, he filed in the court below a "Motion For Order Correcting The Date Of Entry Of Judgment." The court below denied that motion in a letter dated October 31, 1986 and in a subsequent order dated November 10, 1986. (See Exhibits III and IV, copies of letter and order). Both the letter and the order make it clear that final judgment was entered in the court below on September 4, 1986. *See Peyton v. Ellyson*, 207 Va. 423, 430-431, 150 S.E.2d 104, 110 (1966) (final judgment is entered in a habeas corpus case when the habeas judge "signed the order setting forth his judgment").

6. The respondent respectfully requests this Court to give this motion expedited consideration in order to spare the Commonwealth the considerable time and expense it will take to respond to the multitude of claims raised by Coleman in his petition for appeal. The Commonwealth makes this request only because the appeal clearly has not been perfected in a timely manner. No motion has been filed by the respondent to this date

because until the respondent received a copy of the petition for appeal on December 8, 1986, respondent had no notice of any pending proceeding in this Court. Respondent received no notice until this date that the record in this appeal had been mailed to the Clerk of this Court by the clerk of the trial court.

WHEREFORE, the respondent requests this Court to act upon this motion expeditiously and to dismiss the appeal because the notice of appeal was not filed in a timely manner.

Respectfully submitted,
GARY L. BASS, WARDEN
By /s/ Donald Curry
Counsel

Donald R. Curry
Senior Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

VIRGINIA:

In the Supreme court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 19th day of May, 1987.

Roger Keith Coleman,

Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden, etc.,

Appellee.

From the Circuit Court of Buchanan County

On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.

Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Debra A. Anderson
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 1987.

Roger Keith Coleman,

Appellant,

against Record No. 861147
Circuit Court No. 119-84

Gary L. Bass, Warden of the
Mecklenburg Correctional Center,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 19th day of May, 1987 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA

ROGER K. COLEMAN,	:	Civil Action
Petitioner,	:	No. 88-0125-A
v.	:	AFFIDAVIT OF
CHARLES THOMPSON, WARDEN, MECKLENBURG CORRECTIONAL CENTER,	:	JOHN M. FARMER
Respondent.	:	

JOHN M. FARMER, being duly sworn, deposes and says:

1. I am a member of the bar of the Commonwealth of Virginia and a member of the firm of Wolfe & Farmer. I submit this affidavit in support of Roger Coleman's opposition to the Commonwealth's Motion to Dismiss.

2. Wolfe & Farmer and Arnold & Porter ("state habeas counsel") represented Mr. Coleman in his state habeas corpus proceedings held before Judge Glyn Phillips of the Buchanan County Circuit Court.

3. On September 7, 1984, petitioner's state habeas counsel filed an amended petition for a writ of habeas corpus. An evidentiary hearing was held on November 12 and 13, 1985.

4. Judge Phillips sent a letter opinion to state habeas counsel on June 23, 1986, in which he stated why he planned to deny Mr. Coleman's amended petition. Judge Phillips asked the Commonwealth's attorney to prepare a final order embodying the court's ruling.

5. The Commonwealth's attorney prepared a proposed final order, which included extensive findings of fact and conclusions of law that were not present in the Court's letter. State habeas counsel objected to this proposed order. We received no notification of Judge Phillips' ruling on our objection until receipt of the final order. Appended to the final order was a certificate dated September 9, 1986, from the Clerk of the Buchanan County Circuit Court, stating that he was attaching "a true and correct copy of an order dated the 4th day of September," which was entered into the docket of *Coleman v. Bass*, the caption for Coleman's state habeas petition.

6. I determined, based upon the plain language of Virginia Supreme Court Rule 5.9 and my experience as a Virginia attorney, that the time for appeal ran from the date the clerk entered the order in the docket book. According to the final order we received, judgment was entered on September 9, 1986. I therefore believed that petitioner's notice of appeal would be timely if mailed to the Court on October 6, 1986. Therefore, I sent the notice of appeal to the Court on October 6, 1986. The notice of appeal stated that petitioner was appealing the judgment of the court entered on September 9, 1986. I also mailed a copy of the notice to the Commonwealth's attorney on that date.

7. We believed that Mr. Coleman's appeal was meritorious and intended to pursue the merits of the appeal before the Virginia Supreme Court. We intended that the notice of appeal be filed in a timely fashion so as to

assure a hearing of our points on appeal by the Virginia Supreme Court.

/s/ John Farmer
John M. Farmer

Sworn to me this 12th day
of July, 1988

/s/ Tammy A. Absher
Notary Public

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA

(Caption Omitted In Printing)

Civil Action No. 88-0125-A
AFFIDAVIT OF DAVID GREEN AND
L. STEVENSON PARKER

DAVID E. GREEN and L. STEVENSON PARKER, being duly sworn, depose and say:

1. Mr. Parker is a member of the bar of the District of Columbia and is associated with the law firm of Arnold & Porter. Mr. Green, also a member of the District of Columbia bar and formerly associated with Arnold & Porter, is now a trial attorney with the Public Integrity Section of the Department of Justice.

2. We, along with John M. Farmer of Wolfe & Farmer ("state habeas counsel"), represented Mr. Coleman in the state habeas corpus proceedings held before Judge Glyn Phillips of the Buchanan County Circuit Court.

3. Mr. Coleman's state habeas counsel filed an amended petition for a writ of habeas corpus on September 7, 1984. A hearing was held before Judge Phillips on November 12-13, 1985. On June 23, 1986, Judge Phillips mailed state habeas counsel a letter setting forth various reasons why Mr. Coleman's amended petition should be denied.

4. This letter did not represent the court's final judgment, however, as the court requested that the Commonwealth's attorney prepare a final order and submit it to the court. The Commonwealth submitted a proposed order, to which we objected.

5. We received notification of the court's judgment when we received the Commonwealth's proposed final order, signed by the Judge. The order was accompanied by a note dated September 9, 1986, from the Deputy Clerk of the Court for Buchanan County. Appended to the order was a certificate, dated September 9, 1986, from Russell Presley, Clerk of the Buchanan County Circuit Court, certifying that he was attaching "a true and correct copy of an order dated the 4th day of September," which had been entered into the docket of the case of *Coleman v. Bass* (the caption for the state habeas corpus proceeding).

6. In determining the date the final order was entered for the purpose of preparing the notice of appeal, we took into consideration the fact that Judge Phillips lives and works in Clintwood, Virginia, which is located some distance from Grundy, Virginia, the site of the Clerk of the Court for Buchanan County. We knew it was Judge Phillips' custom and practice to mail documents from Clintwood for filing in Grundy. This meant that the date Judge Phillips signed the order could not be the same date the order was received and entered by the Clerk's office. We therefore understood that the date of the certificate by the Clerk's office – September 9 – was the date of entry of the judgment.

7. Accordingly, the notice of appeal stated on its face that the appeal was from a final judgment entered September 9.

8. Virginia Supreme Court Rule 5:9 provides, in pertinent part, "[n]o appeal shall be allowed unless, within 30 days after entry of final order or other appealable order or decree, counsel for the appellant files with the

Clerk of the trial court a notice of appeal. . . . " We therefore understood that our notice of appeal could be filed up to 30 days after September 9, or by October 9, 1986.

9. Mr. Farmer mailed the notice of the Clerk on Monday, October 6, 1986, and it was received October 7, 1986. Mr. Farmer also mailed a copy of the notice to the Commonwealth on that same date.

10. We never intended to bypass the state system, but attempted in every way possible to have the Virginia Supreme Court determine the questions on appeal on their merits. Toward that end, we filed a brief and reply brief on the merits, as well as reply and surreply briefs to the Commonwealth's motion to dismiss.

11. We had numerous conversations with counsel for the Commonwealth from the time we became state habeas counsel until the time the briefs in the Supreme Court were filed. In those conversations, we repeatedly affirmed what the Commonwealth knew all along: that Roger Coleman, if unsuccessful at the state trial level, would appeal to the Virginia and United States Supreme Courts, and from there, if necessary, to the federal system.

/s/ David E. Green
David E. Green

/s/ L. Stevenson Parker
L. Stevenson Parker

SEAL
Sworn to me this
13th day of
July, 1988

/s/ Brenda Brauley Still
Notary Public
Brenda Brauley Still
Notary Public District of Columbia
My Commission Expires: illegible

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

(Caption Omitted In Printing)

CIVIL ACTION NUMBER 88-0125-A

ORDER

FILED DEC 06 88

In accordance with a Memorandum Opinion entered this date, the petition for habeas corpus is denied in its entirety.

Nothing further remaining to be done, this case is dismissed and stricken from the docket.

The Clerk is directed to send certified copies to counsel of record.

ENTER: This 6th day of December 1988.

/s/ Glen M. Williams
UNITED STATES
DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: /s/ A. Cook
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

(Caption Omitted In Printing)

CIVIL ACTION NUMBER 88-0125-a

MEMORANDUM OPINION

Roger Keith Coleman ("Coleman") was convicted of the rape and capital murder of Wanda McCoy in Buchanan County, Virginia. For the rape conviction, punishment was fixed at life imprisonment and on a separate hearing on the issue of punishment for the capital murder conviction, a sentence of death was imposed. The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). A writ of certiorari was denied by the United States Supreme Court. 46 U.S. 1109 (1984). On April 26, 1984, Coleman filed a petition for a writ of habeas corpus in the Buchanan County Circuit Court. An evidentiary hearing was conducted and a letter opinion dated June 23, 1986 rejected Coleman's claims. The Order in accordance with the letter opinion was signed on September 4, 1986. Coleman filed a notice of appeal on October 7, 1986 and subsequent thereto, filed a motion to correct the date of entry of judgment in the Circuit Court. Coleman requested in the motion that the Circuit Court correct the date of final judgment from September 4, 1986 to September 9, 1986. This motion was denied and on December 3, 1986 Coleman filed a petition for appeal in the Virginia Supreme Court. A motion to dismiss the appeal was filed on the grounds that the notice of appeal had not been filed in a timely manner. The Virginia Supreme Court granted the motion to dismiss by Order dated May 19, 1987 and subsequently denied a petition for a rehearing on June 12, 1987. On September 10, 1987, Coleman filed a petition for a writ of certiorari in the United States Supreme Court, which

petition was denied on October 19, 1987. *Coleman v. Bass*, 108 S.Ct. 269 (1987).

Coleman now files this complaint challenging the validity of his convictions and death sentence, raising the following claims:

A. AT LEAST ONE MEMBER OF THE JURY, GEORGE MARRS, FAILED TO DISCLOSE HIS PRECONCEIVED OPINION OF COLEMAN'S GUILT.

B. COLEMAN WAS NOT AFFORDED REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

C. COMMUNITY PREJUDICE SO INFECTED THE TRIAL AS TO DEPRIVE COLEMAN OF AN IMPARTIAL JURY AND DUE PROCESS OF LAW.

D JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

E. THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY EVIDENCE.

F. THE PROSECUTION'S CLOSING ARGUMENT DENIED COLEMAN A FAIR TRIAL.

G. THE JURY INSTRUCTIONS AT THE PENALTY STAGE WERE CONSTITUTIONALLY INADEQUATE.

H. THE ADMISSION OF PHOTOGRAPHS DENIED COLEMAN A FAIR TRIAL.

I. EVIDENCE OBTAINED IN VIOLATION OF *MIRANDA* WAS IMPROPERLY ADMITTED.

J. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

K. VIRGINIA'S CAPITAL MURDER STATUTE AND SENTENCING PROCEDURES ARE UNCONSTITUTIONAL FACIALLY AND AS APPLIED, UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Claims C, H, I, and J were raised by Coleman in his direct appeal from his conviction to the Supreme Court of Virginia. Claims A, B, D, E, F, G, and K were raised by Coleman in the state habeas petition and therefore, the petitioner has exhausted state remedies on all of the issues raised in this case. Defendant has filed a motion to dismiss all of Coleman's claims. The matter has been thoroughly briefed and has been orally argued and is now ripe for decision.

The defendant contends that claims A, B, D, E, F, G and K which were not raised on direct appeal, but were subsequently raised in the state habeas proceedings are barred from federal review because Coleman failed to perfect an appeal to the Supreme Court of Virginia. Rule 5:9 (a), Rules of the Supreme Court of Virginia, provides that a notice of appeal must be filed with the clerk of the trial court within thirty days after entry of final judgment. The time limit cannot be extended. Rule 5:5 (a). The Order dismissing the habeas petition was signed by the Circuit Court Judge on September 4, 1986 and so states on its face. Actually, the evidence shows that Coleman's counsel had known since June 23, 1986 the decision of the Circuit Court Judge in the letter mailed to the parties. Coleman did not file his notice of appeal until thirty-three days after entry of judgment. Coleman sought the court to change the date of the state court Order on the theory that the entry of judgment did not occur until the

Clerk of Buchanan County Circuit Court had actually filed the same.

The Supreme Court of Virginia has held that Rule 5:9 (a) is mandatory. *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1974). Coleman, having failed to follow the required state procedural rule, has procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72 (1977). *Sykes* applies to capital and non-capital cases. *Smith v. Murray*, 477 U.S. 527, 538 (1986). It is argued, however, that the blame for the procedural fault rested upon the habeas attorneys and that the petitioner has just cause not to be bound by the procedural error. The right to effective assistance of counsel is not required as a constitutional right in state habeas proceedings, *Evitts v. Lucy*, 469 U.S. 387 (1985). Since there is no constitutional right to counsel during state habeas proceedings, there is no constitutional right to effective assistance of counsel at that stage. *Whitley v. Muncey*, 823 F.2d 55 (4th Cir. 1987), *cert. denied*, 107 S.Ct. 3279 (1987). A state court dismissal of appeal because a notice is filed one day late does not deny due process. *Wainwright v. Torna*, 455 U.S. 586 (1982). This court accordingly finds that Coleman defaulted by failing to perfect his habeas appeal in the Virginia Supreme Court in a timely manner. However, in view of the gravity of this case, the court will proceed to analyze the various claims made by Coleman.

Coleman also contends that the state court, upon hearing his habeas proceeding, failed to make credibility findings on matters which were in dispute and also desires an additional evidentiary hearing to present additional evidence which was not presented in the state court. The court has reviewed the record in the state court

proceedings and finds that the state Circuit Court Judge, hearing the case, did make specific evidentiary findings of credibility and to allow Coleman to present again this same matter before this court is to have this court to consider whether it would make the same credibility finding that was made by the state court. Coleman was represented by counsel, was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all the matters that were presented to it. Therefore, the court is of the opinion that, since there was an adequate hearing given to Coleman on the state level, it is improper to conduct another hearing in this court.

A. WAS JUROR MARRS PREJUDICED AGAINST THE DEFENDANT IN SUCH A WAY THAT HE SHOULD NOT HAVE BEEN A JUROR AND DID HE FAIL TO DISCLOSE THIS FACT ON VOIR DIRE?

At the state evidentiary hearing, Coleman presented the evidence of Texas and Opal Rash who were first cousins of a juror by the name of George Marrs. These two witnesses testified that some time prior to Coleman's trial, Marrs had expressed to them a desire to serve on Coleman's case and also expressed an opinion that Coleman was guilty. They also presented evidence that Marrs stated that he "wanted to help burn the s.o.b." George Marrs appeared and testified as a witness and categorically denied any such conversation with the Rashes and denied that he made any statements attributed to him and denied that he was prejudiced in any way at Coleman's trial.

In a letter opinion dated June 23, 1986, the state habeas court recited the Rashes' testimony and found that the issue was one of credibility. The court then concluded that "the testimony of George Marrs was not biased and was credible." This court must presume that this finding that Marrs' testimony was credible is correct. 28 U.S.C. § 2254(d), *Summer v. Mata*, 455 U.S. 591, 592 (1982); *Marshall v. Lonberger*, 459 U.S. 422 (1983); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

In conjunction with the claim that Marrs was an improper juror, Coleman also contends that he was denied the opportunity to question Marrs concerning whether or not he knew that Coleman had been convicted of a prior felony, of attempted rape, and that such knowledge was a significant factor in the jury's deliberations at the guilt stage of the trial. Nowhere in the petition for a writ of habeas corpus did Coleman allege that the jury had been improperly influenced during deliberations by knowledge of Coleman's prior record. There is nothing in the state court's decision whereby it purported to decide such a claim. Since Coleman did not raise this claim in his state petition he cannot raise it now. *Whitley v. Bair*, 802 F.2d 1487, 1500 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1618 (1987). Even if procedural default were not involved, the evidence Coleman sought to have admitted is inadmissible. The Federal Rules of Evidence provide that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . . " Fed. R. Ev. § 606(b). It would

contravene this rule to allow Marrs to testify to his and other jurors' states of mind during their deliberations.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Coleman advances several instances which he alleges constitute ineffective assistance of counsel. Coleman must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

Coleman's first allegation of ineffective assistance of counsel is that "[c]ounsel failed to provide effective assistance with respect to Coleman's motion for a change of venue based on prejudicial publicity and community prejudice . . . . " The record shows that his attorney did present five newspaper articles and the testimony of Coleman's father and also attempted to enlist the assistance of other members of Coleman's family. Therefore, there was evidence presented on behalf of Coleman in order to obtain a change of venue. Trial counsel, however, was of the opinion based upon his experience in the county, that he could get a fair trial in Buchanan County and that under existing law, it would be necessary for them to show that he could not get a fair trial during the jury selection process. Therefore, counsel conducted an extensive voir dire which consumes more than two hundred and fifty pages of the transcript. While, in hindsight, it may appear that counsel could have done more on the change of venue, this court is of the opinion that the attorney did an excellent job of pursuing this matter and cannot be second-guessed.

Coleman contends that his counsel conducted a constitutionally ineffective voir dire concerning juror attitudes toward the death penalty and exposure to pretrial publicity. During voir dire eight jurors were excluded for cause, without objection, because they indicated they could not impose the death penalty. Coleman's counsel did not attempt to rehabilitate these witnesses. The court does not find that counsel's failure to rehabilitate constitutes ineffective assistance. Counsel knew the jurors were excludable for cause. *Lockhart v. McKee*, ___ U.S. ___, 106 S.Ct. 1758 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). With respect to voir dire concerning exposure to pretrial publicity, the court has already noted counsel's "extensive and searching voir dire." The court concludes that Coleman was adequately assisted by counsel during jury voir dire.

Coleman also contends that during the guilt stage, preparation was inadequate. However, this court agrees with the state Circuit Judge who tried the habeas case that trial counsel did adequately investigate, prepare for and present the case at the guilt stage and that they had an excellent understanding and knowledge of the facts of the case. This court agrees with the findings of the state habeas court that counsel's cross-examinations of the prosecution's witnesses showed an excellent understanding and knowledge of the facts of the case. An expert attorney called by the plaintiff at the habeas hearing found that the cross-examination was "a good job." Coleman claims that he was prejudiced because his counsel did not personally interview Roger Matney and also contends that they failed to interview certain prosecution witnesses. Coleman did not produce any evidence at the

state habeas hearing and he has not proffered any to this point as to any witnesses that were not interviewed and the court is of the opinion that the failure to interview personally Roger Matney is speculative as to any possible prejudice.

Coleman contends that his attorneys failed to file appropriate motions. More specifically, he contends that counsel should have filed a discovery motion requesting Phillip Van Dyke's time card. The crime for which Coleman was convicted occurred at 11:00 p.m. Coleman spoke with Van Dyke from 10:25 to 10:30 p.m. on the evening in question. When Van Dyke left Coleman, he proceeded directly to work and "punched in" at 10:41 p.m. This conversation with Van Dyke constituted a link in the chain of Coleman's alibi defense. Van Dyke's time card was not introduced at trial; however, Van Dyke testified that he punched in at 10:41 p.m. and his testimony was not disputed. The court fails to see how this constitutes deficient performance on the part of defense counsel. Although the time card was not introduced there certainly was evidence introduced as to the time of the Coleman-Van Dyke conversation.

Coleman also contends that his counsel were ineffective because they failed to object to the argument presented by the prosecution. The court has reviewed the arguments submitted by the prosecution and is of the opinion that any failure to object was simply a matter of strategy on the part of counsel. Attorneys are generally reluctant to object to argument where the objection will merely highlight the objectionable information. This trial tactic does not constitute ineffective assistance of counsel.

Coleman also contends that there was inadequate preparation and presentation of evidence at the penalty stage of his trial. Upon a review of the record, the court is of the opinion that counsel properly prepared Coleman for the penalty proceeding and requested Coleman to give them the names of witnesses but Coleman did not provide any. It was the testimony of trial counsel that Coleman told them that he didn't want any witnesses and didn't want anybody at the penalty stage of the hearing. Counsel received no help from the friends and relatives of Coleman. Such witnesses as were called were witnesses that were found and deemed to be relevant by counsel and not as a result of any help that they received from Coleman or his family. Coleman also contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

Coleman also contends that he was given ineffective assistance of counsel on direct appeal. However, Coleman's attorneys raised a total of seven issues before the Virginia Supreme Court, all of which had been properly preserved for appeal and all of which were decided by the Virginia Supreme Court. The court is of the opinion that counsel proceeded properly.

C. DID THE STATE TRIAL COURT IMPROPERLY DENY COLEMAN'S MOTION FOR CHANGE OF VENUE?

Coleman contends that the state trial court improperly denied his motion for change of venue or venire. The

Virginia Supreme Court specifically found that the trial court "had no difficulty in impaneling a jury free from bias." *Coleman v. Commonwealth*, 226 Va. 31, 45, 307 S.E.2d 864-872 (1983). Under 28 U.S.C. § 2254(d) this court must afford a presumption of correctness to the state court finding that the jurors were fair and impartial. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Summer v. Mata*, 449 U.S. 539 (1981). The record indicates that the trial court was extremely careful to assure that a fair and impartial jury was impaneled. Coleman conducted extensive individual voir dire. No juror was seated over Coleman's objection. The court concludes that the jury was fair and impartial and the trial court did not err in denying Coleman's motion for a change of venue or venire.

D. EXCLUSION OF JURORS WHO OPPOSED DEATH PENALTY

At the trial, eight jurors were excluded for cause because they opposed the death penalty. Coleman now contends that this was prejudicial error. Coleman did not raise this issue at trial or on appeal. The state habeas court determined that Coleman was barred by Virginia law from raising the claim in his state habeas petition. *Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). The United States Supreme Court has held that "absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver" federal habeas review is barred. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1976). Coleman has alleged no cause for his failure to raise this claim. This court, therefore, is barred from reviewing it.

E. DID THE COURT COMMIT DISCOVERY VIOLATIONS BY FAILURE TO OBTAIN EXCULPATORY EVIDENCE ON BEHALF OF COLEMAN?

Coleman alleges that the Commonwealth denied his due process rights by failing to provide Coleman with several items of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1962). The *Brady* case "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or punishment' " *United States v. Bagley*, 473 U.S. 667, 675 (1984). The *Bagley* case defined materiality as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

Id. at 682.

Coleman alleges the prosecution failed to disclose four items of exculpatory evidence: notes police took when interviewing Coleman's wife, Van Dyke's "time card," the crime scene report and Sandra Stiltner's statement. The court concludes these items of evidence were disclosed to Coleman. These items of evidence were in the prosecution's file. At the state habeas hearing Coleman's trial attorneys testified that they had full access to the prosecution's entire file. Therefore, the court concludes the prosecution did comply with *Brady v. Maryland*.

Even if the prosecution had not disclosed the material evidence, there was no due process violation. Coleman alleges that his wife told police he had arrived at

home at 11:05 p.m. She had, however, also told both police and defense counsel that Coleman had arrived at home at 11:30 p.m. There is no reasonable probability that police notes that indicated she once put 11:05 p.m. as the time of Coleman's arrival at home would have changed the outcome of the trial. As to the Van Dyke "time card," Van Dyke testified as to all of the relevant information on his time card. Disclosure of the time card would not have changed the outcome of the trial nor is it probable that the crime scene report would have changed the trial. It indicates that there was a mark made with very little pressure on the door to the victim's home. It is not probable that this would have affected the outcome of the trial given the fact that the victim's husband and the police chief testified that there was no sign of forced entry into the house. Finally, Coleman alleges that a statement made by Sandra Stiltner indicated Coleman came by her trailer between 10:00 and 10:30 on the night in question. At trial Ms. Stiltner testified Coleman could have left as late as 10:25 p.m. There is no reasonable probability, therefore, that the disclosure of Ms. Stiltner's statement would have affected the outcome of the trial.

F. IMPROPER PROSECUTORIAL ARGUMENT

The state habeas court found that all of the claims regarding prosecutorial argument were procedurally defaulted because they had not been raised at trial nor on appeal citing *Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). This court is of the opinion that this matter has been double-defaulted in that it was not raised at trial nor

was it raised on appeal and it was further procedurally defaulted in the appeal of the habeas proceedings.

G. CONSTITUTIONAL ADEQUACY OF THE PENALTY STAGE INSTRUCTIONS

The state habeas court ruled that the claim was barred from habeas by Coleman's procedural default. The court is of the opinion that this is correct and the claim was again defaulted when Coleman failed to perfect an appeal of the habeas proceeding. This court has further reviewed the instructions however in the light of *James Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984) and the court finds that the penalty stage instructions at Coleman's trial satisfy the *Briley* standard.

H. SHOULD PHOTOGRAPHS OF THE VICTIM'S BODY FOUND AT THE SCENE OF THE CRIME HAVE BEEN ADMITTED INTO EVIDENCE?

Federal courts do not sit to review state evidentiary questions. *Lisenba v. California*, 314 U.S. 219 (1941). Unless there is something fundamentally unfair so as to make a constitutional issue of the same, generally this court is bound by the evidentiary findings of the state court. There is no contention that the photographs do not accurately depict what they purport to depict and such matters are and should be left to the discretion of the trial judge. The Virginia Supreme Court has found that the photographs were relevant and material under the facts of the case and this court is certainly required to give due deference to this finding by the state Supreme Court.

I. DID THE STATE COURT CORRECTLY REJECT COLEMAN'S *MIRANDA* CLAIM?

Coleman's [sic] argues that the trial court admitted two statements the police obtained from him in violation of *Miranda*. The state habeas court found the interrogatories to be noncustodial. This finding is entitled to a presumption of correctness. The interview of Coleman took place in a police officer's vehicle parked outside Coleman's house. At the trial, the officer testified that Coleman was free to leave. Coleman was not arrested until a month after this interview. Thus this court must concur with the state habeas court that there was no custodial interrogation.

J. WAS THE EVIDENCE SUFFICIENT TO SHOW COLEMAN'S GUILT BEYOND A REASONABLE DOUBT?

Coleman argues that the evidence was insufficient to support the jury's verdict. In determining this issue, this court must view the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The Virginia Supreme Court in reviewing this issue followed a stricter standard. The Virginia court followed the rule that circumstantial evidence must be "sufficiently convincing to exclude any reasonable hypothesis except that of guilt." *Coleman v. Commonwealth*, 226 Va. 31, 53, 307 S.E.2d 864, 876 (1983). If the evidence is sufficient to meet the Virginia standard, then *a fortiori* it is sufficient to meet the lesser *Jackson*

standard. *Inge v. Procunier*, 758 F.2d 1010, 1014 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 104 (1985). The court finds that there was sufficient evidence to support the jury's verdict. There is a wealth of circumstantial evidence in this case in addition to evidence that Coleman admitted to Roger Matney that he had participated in the rape-murder. Clearly, there was sufficient evidence in this case to go to the jury and there is sufficient evidence under the *Jackson* standard to sustain this conviction.

K. CONSTITUTIONALITY OF VIRGINIA'S DEATH PENALTY STATUTE

The state habeas court held that Coleman had procedurally defaulted with respect to his claim that Virginia's death penalty statute is unconstitutional because he failed to raise the claim at trial or on dire court appeal. *See, Slayton v. Perrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). As noted earlier, in the absence of both cause and prejudice, federal habeas review is barred where there is a state procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Clanton v. Muncy*, 845 F.2d 1238 (4th Cir. 1988). Coleman has alleged neither cause for his default nor prejudiced [sic] from his default; therefore, it is not appropriate for this court to review this particular claim.

CONCLUSION

The court having found on the merits that there was no denial of any constitutional rights of Coleman in his trial and the various appeals and other hearings related thereto, the court is of the opinion that this petition for

habeas corpus shall be denied in its entirety and an Order will entered [sic] to that effect.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 6 day of December 1988.

/s/ Glen M. Williams
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-4002

ROGER K. COLEMAN

Petitioner - Appellant

v.

CHARLES THOMPSON, Warden

Respondent - Appellee

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. Glen M. Williams, Senior District Judge. (CA-88-125-A)

Argued: October 2, 1989 Decided: January 31, 1990

Before CHAPMAN, Circuit Judge, BUTZNER, Senior Circuit Judge, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

BUTZNER, Senior Circuit Judge:

Roger Keith Coleman, a Virginia prisoner sentenced to death, appeals the district court's denial of his petition for a writ of habeas corpus. The district court concluded that Coleman's claims were procedurally defaulted. We affirm.

Coleman was convicted on March 18, 1982, in the Circuit Court of Buchanan County, Virginia, of rape and capital murder. The opinion affirming his conviction recounts the facts about the crime and the evidence introduced for the imposition of a death sentence. *See Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109 (1984). Coleman then applied for a writ of habeas corpus in the Circuit Court of Buchanan County. After an evidentiary hearing, the court denied the writ. The Supreme Court granted the state's motion to dismiss Coleman's appeal. Again, the Supreme Court denied certiorari. *Coleman v. Bass*, 484 U.S. 918 (1987). Coleman next petitioned for a writ of habeas corpus in the federal district court, setting forth 11 claims asserting the invalidity of his conviction and sentence. The district court denied relief without an evidentiary hearing, and this appeal followed.

I

In his brief, Coleman states the first issue on appeal as follows:

> Did the District Court err in finding that federal review of Coleman's claims is barred: (a) when dismissal by the Virginia Supreme Court was based on the novel reading of an ambiguous procedural rule, (b) when Coleman's late filing of his notice of appeal did not represent a deliberate bypass of the courts, and (c) when application of procedural default rules to counsel's error in filing the appeal one day late would deny Coleman meaningful access to the courts?

The district court found that the Virginia Supreme Court had dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Consequently, the district court dismissed as procedurally defaulted the following seven claims, which were raised only in the state habeas proceeding and not on direct appeal:

> At least one member of the jury, George Marrs, failed to disclose his preconceived opinion of Coleman's guilt.
>
> Coleman was not afforded reasonably effective assistance of counsel.
>
> Jurors were improperly excluded because of their opposition to imposition of the death penalty.
>
> The prosecution failed to disclose exculpatory evidence.
>
> The prosecution's closing argument denied Coleman a fair trial.
>
> The jury instructions at the penalty stage were constitutionally inadequate.
>
> Virginia's capital murder statute and sentencing procedures are unconstitutional facially and as applied, under the Eighth and Fourteenth Amendments to the Constitution of the United States.

A

The district court premised its finding of procedural default on the Virginia Supreme Court order which dismissed as untimely Coleman's notice of appeal from the adverse ruling of the state habeas court. Rule 5:9(a) of the Virginia Supreme Court provides:

> No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

The state habeas court entered its order denying a writ of habeas corpus on September 4, 1986. Coleman filed his notice of appeal on October 7, 1986, one day late, counting from September 5 and omitting Saturday and Sunday, October 4 and 5. Va. Code Ann. §§ 1-13.3 and 1-13.3:1 (1987). Two weeks later Coleman moved the state habeas court to correct the date of final judgment from September 4 to the date the clerk recorded the order in the common law order book, September 9. The court denied the motion, stating in its order "final judgment was entered on September 4, 1986."

On December 4, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. The state responded by moving to dismiss the petition on the sole ground that Coleman had filed his notice of appeal more than 30 days after the entry of final judgment. Both sides then briefed the motion and the merits of the petition. The Supreme Court ruled: "[T]he motion to dismiss is granted and the petition for appeal is dismissed."

A state habeas petitioner who fails to meet the requirements of state procedural law, and who has his petition dismissed on that basis by the last state court to review it, loses federal review of the federal claims raised in the state petition in the absence of cause and prejudice or a fundamental miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478

(1986). Procedural default can be invoked by the state only when "the state court's opinion contains a 'plain statement that [its] decision rests upon adequate and independent state grounds.'" *Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)).

Coleman argues that the Virginia Supreme Court did not clearly and expressly rely on a state procedural rule in dismissing his petition for appeal. He points to the Court's recital that among other papers it considered the briefs that had been filed in opposition to the petition.

Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that *Harris* made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.[1]

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[1] The order states:

> On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.
>
> Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a

(Continued on following page)

The district court properly concluded that the failure to comply with Rule 5:9(a) was an adequate ground to apply the bar of procedural default. The rule is mandatory. *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1974). The mandatory nature of the rule does not make it unconstitutional. Dismissal of an application for discretionary review because it is untimely does not deprive the applicant of due process of law. *Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982). Even in a capital case, procedural default justifies a federal habeas court's refusal to address the merits of the defaulted claims. *Smith v. Murray*, 477 U.S. 527 (1986).

B

Coleman asserts that the district court erred because the dismissal by the Virginia Supreme Court was based on a novel reading of an ambiguous procedural rule, namely, whether an order is "entered" on the date the judge issues it or the date the clerk records it. He relies on the proposition that a procedural ground is inadequate if

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(Continued from previous page)

reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed.

it fails to provide fair notice to the litigant. *See, e.g., James v. Kentucky*, 466 U.S. 341 (1984).

The major premise of Coleman's argument is flawed. The rule is not ambiguous. Its application by the Supreme Court was not novel. Notice to Coleman was adequate. The final order of the state habeas court contains the following notation immediately above the judge's signature: "Entered this 4th day of September 1986." Virginia case law giving effect to the judge's notation of entry is clear. In *Peyton v. Ellyson*, 207 Va. 423, 430-31, 150 S.E.2d 104, 110 (1966), the Court held that the final order denying a petition for writ of habeas corpus was entered on the date the judge signed the order and that the time for appeal started running from that date.

C

Coleman next argues that the rule of procedural default is inapplicable because his late filing did not represent a deliberate bypass of the courts. He relies on *Fay v. Noia*, 372 U.S. 391 (1963), and its progeny, *Ferguson v. Boyd*, 566 F.2d 873 (4th Cir. 1977).

Murray v. Carrier forecloses Coleman's reliance on *Fay* and *Ferguson* by holding that whether procedural default in appellate proceedings bars federal consideration of the defaulted claims should be determined by the cause and prejudice standards of *Wainwright v. Sykes*, and not by the deliberate bypass standard of *Fay*. 477 U.S. at 485-92. *See also Smith v. Murray*, 477 U.S. at 533. In *Murray v. Carrier*, the Court noted that it expressed no opinion concerning application of the deliberate bypass standard to decision of counsel "not to take an appeal at all." 477

U.S. at 492. But this reservation need not detain us, because Coleman's counsel decided to take an appeal.

D

A prisoner can avoid the bar of procedural default if he can show "cause for the noncompliance" with state law and "actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. at 84. Coleman assigns as cause his counsel's error in failing to file a timely notice of appeal from the final order of the state habeas court. The error, he asserts, is of sufficient magnitude to constitute ineffective assistance of counsel that denied him access to the courts. He relies on *Murray v. Carrier*, 477 U.S. at 489, where the Court discussed the circumstances which would justify treating error of counsel as cause.

Coleman's reliance on *Murray v. Carrier* is misplaced. There the Court was discussing error arising out of a direct appeal in which a prisoner has a right to counsel whose performance is not constitutionally ineffective. In contrast, the error in Coleman's case occurred in state habeas corpus proceedings. The difference in the proceedings is significant, for a state prisoner seeking a writ of habeas corpus does not have a constitutional right to counsel. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

Wainwright v. Torna rejects a claim that is essentially similar to Coleman's. In *Torna*, a prisoner's counsel filed an application for discretionary review in the state Supreme Court one day late. The prisoner charged that this error denied him effective assistance of counsel. The

Supreme Court held: "Since [the prisoner] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." 455 U.S. at 587-88. Because Coleman, like Torna, had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. Thus, he cannot show "cause" by showing ineffective assistance of counsel. *But see Madyun v. Young*, 852 F.2d 1029, 1033 n.2 (7th Cir. 1988) (dictum).

E

A prisoner may also avoid the bar of procedural default by demonstrating that denial of federal review will result in a fundamental miscarriage of justice. *Harris v. Reed*, 109 S. Ct. at 1043; *Smith v. Murray*, 477 U.S. at 537; *Murray v. Carrier*, 477 U.S. at 495. This avenue of relief, however, is limited to "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. at 496. This principle does not entitle Coleman to avoid the bar of his procedural default.

The district court found that the evidence was sufficient to show Coleman's guilt beyond a reasonable doubt. The evidence included Coleman's admission that he participated in the crimes. Hair, blood, and semen typing indicated that Coleman raped the victim. *See Coleman v. Commonwealth*, 226 Va. at 52-53, 307 S.E.2d at 876. Proof of Coleman's conviction for the attempted rape of another person several years earlier and the manner in which he killed his victim in the case were aggravating factors that

the jury could consider in imposing the death sentence. *See* 226 Va. at 53-55, 307 S.E.2d at 876-77.

In sum, we conclude that the district court did not err by ruling that the failure by Coleman's counsel to file a timely notice of appeal from the final order of the state habeas court constituted a procedural default barring federal review of the claims asserted only in the state habeas corpus proceeding.

II

The second issue raised by Coleman is as follows:

> Did the District Court err in dismissing Coleman's petition without first holding an evidentiary hearing even though material factual disputes raised in collateral review proceedings before the Commonwealth courts had not been resolved?

Coleman asserts that the state court did not resolve factual disputes pertaining to his claim that one of the jurors, George Marrs, was biased against him. He also contends disputed issues of fact remain with respect to his claim of ineffective assistance of counsel.

Neither the complaint about the juror nor the claim of ineffective assistance of counsel was raised on direct appeal. Therefore, Coleman's procedural default in failing to file a timely notice of appeal of the state court's final judgment denying his petition for a writ of habeas corpus bars his review in federal court. Consequently, an evidentiary hearing was unnecessary.

III

The district court held that Coleman's next three issues were also barred by procedural default. Nevertheless, it alternatively considered Coleman's claims and found them to be without merit. In addition to his general denial of procedural default, Coleman assigns error to the district court's alternative disposition of his claims for lack of merit. He raises the following issues:

> Did the District Court err in finding that Coleman was not convicted by a biased jury even though evidence presented in the collateral review proceedings in the Commonwealth courts demonstrated that one of the jurors had, before trial, expressed his desire to be on the jury so he could help "burn" Coleman?
>
> Did the District Court err in finding that Coleman was effectively represented by counsel when the evidence demonstrates that the representation Coleman received, from the change of venue motion, through trial preparation and the sentencing proceeding, was grossly deficient and prejudiced Coleman?
>
> Did the District Court err in finding that the Commonwealth satisfied due process discovery requirements even though it failed to produce to Coleman evidence which supported Coleman's alibi and undermined the prosecution's theory of the case?

None of the claims mentioned in these issues was raised on direct appeal. The state habeas court found that they lacked merit, and the Virginia Supreme Court denied discretionary review because Coleman's notice of appeal was untimely.

The district court properly sustained the state's position that Coleman's procedural default barred federal review of all of these claims.

IV

Coleman asserts that the death penalty was unconstitutionally imposed for reasons that he states in the final issue that he raises on appeal:

> Did the District Court err in finding that the death penalty was constitutionally imposed on Coleman in spite of the fact that (a) the record cannot support the conclusion that the jury met the requirements of Virginia law by unanimously finding the existence of an aggravating circumstance, and (b) the jury was not provided with a constitutionally adequate limiting construction for Virginia's "outrageously or wantonly vile" aggravating circumstance?

Coleman made no objection in the trial court or on direct appeal to the errors he now assigns. As we have previously noted, Coleman did not perfect a timely appeal from the denial of his state habeas corpus petition. The state asserts, and the district court properly ruled, that federal review of Coleman's complaints about the constitutionality of the death sentence is barred by his procedural default at both the trial and habeas proceedings.

V

Quite apart from the propriety of the instructions in the penalty phase of the trial, the decision of the Virginia Supreme Court establishes that Coleman's sentence was

lawful. Neither the Sixth nor Eighth Amendment requires "a jury trial on the sentencing issue of life or death." *Hildwin v. Florida*, 109 S. Ct. 2055, 2056 (1989) (Sixth Amendment); *Cabana v. Bullock*, 474 U.S. 376, 384-88 (1986) (Eighth Amendment). State law may authorize a forum other than the jury to impose the death penalty. An appellate court is a constitutionally permissible forum. *Cabana*, 474 U.S. at 392.

Cabana dealt with an aggravating factor necessary for the imposition of the death penalty on one who aids and abets a felony in the course of which others commit a murder. *See Cabana*, 474 U.S. at 378. The Court held that, if authorized by state law, an appellate court can determine whether an aggravating factor has been proved and can impose the death penalty. The appellate court can exercise such power even when the jury may not have found an aggravating factor. 474 U.S. at 384-88. Under these circumstances a federal court should not confine its inquiry to the jury instructions. "Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." 474 U.S. at 387. A federal court errs by "focusing exclusively on the jury and in ordering a new sentencing hearing without inquiring whether the necessary finding of [the aggravating factor] had been made by the trial court or by the state appellate court." 474 U.S. at 389. Although *Cabana* dealt with a specific categorical aggravating factor, the principles the Court explained are applicable to the determination of other aggravating factors in crimes committed under circumstances quite different from those

examined in *Cabana*. *See, e.g., Johnson v. Mississippi*, 108 S. Ct. 1981, 1989 (1988) (White, J., concurring). The major premise of *Cabana* – the Constitution does not require a jury for the imposition of the death penalty – is applicable to Coleman's case.

To apply *Cabana*' principles, a federal court must determine what authority state law confers on its appellate court with respect to the death penalty and then ascertain whether this authority has been constitutionally exercised. *Cf. Spazino v. Florida*, 468 U.S. 447, 457-64 (1984).

Virginia law confers broad powers on the Supreme Court. Va. Code Ann. § 17-110.1 (1988). Every sentence of death must be reviewed by the Court. This review may be consolidated with an appeal, if one is taken. In addition to errors "enumerated by appeal," the Court must consider other specific issues that address the fundamental fairness of the trial and sentence.[2] The statute vests in the Supreme Court extraordinary authority to commute the sentence of death to imprisonment for life. It may affirm the sentence of death or remand for new sentencing proceedings. In short, the only limitation on the Court's power is the authority to impose a death sentence when the trial court, with or without a jury, has imposed a lesser penalty.

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[2] There is no counterpart to this proceeding in the federal judicial system. Federal review of constitutional issues in death cases, unfettered by procedural bars, would promote fairness and reduce the delay and complexity that all too often mark the present system.

In Coleman's case, the Virginia Supreme Court exercised the power conferred on it by § 17-110.1. It compared Coleman's case to others "where the death sentence was based upon the dangerousness of the defendant and the vileness of the crime."[3] *Coleman v. Commonwealth*, 226 Va. at 54, 307 S.E.2d at 877. Justifying the application of these statutory aggravating factors, it recounted that "Colemar., who had previously been convicted of attempted rape, raped his victim, cut her throat, dragged her through her house, and stabbed her twice at or after her death." 226 Va. at 55, 307 S.E.2d at 877. The Court cited as a somewhat analogous case *Smith v. Commonwealth*, in which it constitutionally limited the statutory vileness factor by defining " 'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). The Court stated

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[3] Va. Code Ann. § 19.2-264.4C (1983) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall provide beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

We have upheld the constitutionality of the statute as narrowed by *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). *See Turner v. Bass*, 753 F.2d 342, 353 (1985).

that it had "independently determined that the sentence of death was properly imposed," and it "decline[d] to commute the sentence." 226 Va. at 55, 307 S.E.2d at 877.

In *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858 (1988), the Court explained:

> Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

The Virginia Supreme Court's review of the sentence satisfies this constitutional requirement.

Finding no constitutional infirmity that is cognizable on federal review, we affirm the judgment of the district court denying a writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 89-4002
(Caption Omitted In Printing)

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Chapman and Judge Merhige.

Filed: February 27, 1990

For the Court,

JOHN M. GREACEN
CLERK

SUPREME COURT OF THE UNITED STATES

No. 89-7662

Robert Keith Coleman,

Petitioner

v.

Charles E. Thompson, Warden

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 2, 3 and 4 presented by the petition.

October 29, 1990
